M CHENG CONSTRUCTION SDN BHD

v.

HASMAN JALIL & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING MOTION NO: S5-21-241-2001]
8 AUGUST 2002

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - O. 52, Rules of the High Court 1980 - Whether service of court order must be effected upon contemnor - Whether court order must contain appropriate penal notice - Effect of failure to comply with procedural requirements*

CIVIL PROCEDURE: *Costs - Discretion of court - Principles applicable*

The applicant applied ('encl. 24') to commit both the respondents to prison or to be fined in accordance with O. 52 of the Rules of the High Court 1980 ('RHC') for failure to comply with the consent order dated 3 May 2001 and an order dated 6 June 2001. However, the applicant subsequently applied to withdraw encl. 24, citing non-compliance with the rules as set out in the RHC as the reason of its withdrawal, but with liberty to file afresh. The respondents had no objections to the withdrawal. They, however, sought for: (i) costs and (ii) the striking out of encl. 24 with no liberty to file afresh.

Held:

[1] From the submissions, it was clear that the two orders, dated 3 May 2001 and 6 June 2001 had not been served on both the respondents. In order to constitute a contempt of court through disobedience of a court order, the alleged act of contempt has to take place and only take place after the court order is communicated or made known to the contemnor. Therefore, service of the court order must be effected upon the contemnor. (p 258 c, h)

[2] Further, it is a pre-requisite that before an order of the court can be enforced, the order must contain the appropriate penal notice. The failure to include the penal notice, as was evident in this instance, may render the court order unenforceable in a committal proceeding. (p 259 g-h)

[3] The mistake in filing encl. 24 with all its consequences was borne by those who were responsible in drafting and filing that application. It would have

a been incorrect to allow the applicant a chance to withdraw and refile the same application as in encl. 24. (p 260 h-i)

[4] On the issue of costs, it is the discretion of the court whether to order costs to be paid. It is a judicial discretion that has to be exercised on fixed principles. The discretion is exercisable according to the rules of b reason and justice and not according to the private opinion of the judge. It is also a discretion that will not be based on benevolence or sympathy. (p 260 b-d)

[Application in encl. 24 dismissed with no liberty to file afresh. Applicant c *ordered to pay costs.]*

Case(s) referred to:

Anthony Dubis v. Syarikat Kuin Je Sdn Bhd [1996] 4 MLJ 597 HC ***(refd)***
Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(foll)***
d *Bevington v. Perks [1925] 2 KB 231* ***(foll)***
Capital Insurance Bhd v. BS Sidhu [1996] 3 CLJ 477 CA ***(refd)***
Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 HC ***(foll)***
Chiltern District Council v. Keane [1985] 2 All ER 118 CA ***(refd)***
Chung Onn v. Wee Tian Peng [1996] 5 MLJ 521 HC ***(foll)***
Churchman v. Joint Shop Stewards' Committee of Workers of the Port of London e *[1972] 3 All ER 603 CA* ***(foll)***
Gay v. Hancock [1887] 56 LT 726 ***(foll)***
Iberian Trust Ltd v. Founders Trust and Investment Co Ltd [1932] 2 KB 87 ***(foll)***
Kierson v. Joseph L. Thompson & Sons Ltd [1913] 1 KB 587 ***(foll)***
Knight v. Clifton [1971] Ch 700 CA ***(foll)***
Leow Seng Huat v. Low Mui Yein [1996] 2 BLJ 466 HC ***(refd)***
f *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals [2002] 2 CLJ 695 CA* ***(refd)***
Marshall v. Marshall [1966] 110 Sol Jo 112 CA ***(foll)***
Mathew v. Maughold Life Assurance Co Ltd [1987] 3 PN 98 CA ***(refd)***
Mayor of Bristol v. GW Railway [1916] WN 47 ***(foll)***
g *Mbf Holdings Bhd & Anor v. Houng Hai Kong & Ors [1993] 3 CLJ 373 HC* ***(foll)***
O.K.R.S.T. Arumugam v. K.R.S.S.P. Suppiah Chettiar [1935] 4 MLJ 4 ***(foll)***
PA Thomas & Co & Ors v. Mould & Ors [1968] 1 All ER 963 ***(refd)***
PA Thomas & Co v. Mould [1968] 2 QB 913 ***(foll)***
Re Bramblevale Ltd [1970] Ch 128 CA ***(foll)***
Sharpe v. Wakefield [1891] AC 173 ***(foll)***
h *W Watson & Sons Ltd v. Garbe [1962] 106 Sol Jo 631* ***(foll)***
Wilson v. Raffalovich [1881] 7 QBD 553 CA ***(foll)***

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Legislation referred to:
Courts of Judicature Act 1964, s. 13
Courts of Judicature (Amendment) Act 1994, s. 9
Federal Constitution, art. 126
Rules of the High Court 1980, O. 52

For the applicant - KF Lim; M/s Rusmah Arunan & Assocs
For the 1st respondent - Gurmit Singh; M/s Gurmit & Co
For the 2nd respondent - Unrepresented

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an application by the applicant – M Cheng Construction Sdn Bhd, to commit both the respondents to prison or to be fined in accordance with and in pursuance to O. 52 of the Rules of the High Court 1980 ("RHC") for failure on their part to comply with the consent order dated 3 May 2001 as well as the order dated 6 June 2001. That application of the applicant can be seen in encl. 24 captioned as originating motion and it sought for the following prayers as phrased and framed in the Malay language:

(i) Responden-responden dikomitkan ke penjara dan atau didenda menurut Aturan 52 Kaedah-kaedah Mahkamah Tinggi 1980 kerana melanggar Perintah Persetujuan bertarikh 3 haribulan Mei 2001 dan Perintah bertarikh 6 haribulan Jun, 2001;

(ii) Bahawa arahan yang perlu dan berbangkit diberikan; (dan)

(iii) Kos permohonan ini.

And the English language translation may be stated as follows:

(i) That the respondents be committed to prison and/or fined under Order 52 of the Rules of the High Court, 1980 for non-compliance with the consent order dated May 3, 2001 and the order dated June 6, 2001;

(ii) That any further consequential direction that is necessary be given; (and)

(iii) Costs of this application.

Pure and simple, encl. 24 sought to commit both the respondents to prison or even to have them fined for their disobedience to the consent order dated 3 May 2001 as well as to the order dated 6 June 2001. It too sought for other

consequential reliefs which this court deems it necessary as well as costs of the application in encl. 24.

To The Heart Of The Matter

On the date of the hearing of encl. 24, the first respondent by the name of Hasman bin Jalil was present in open court and he was represented by Mr Gurmit Singh. The second respondent by the name of Mohamad Noh Bin Md Yunan was also present in open court and he was unrepresented. The applicant was represented by Mr KF Lim.

The hearing of encl. 24 would certainly be an interesting affair. Committal proceedings are, by their very nature, exciting and intricate. But the court must exercise great care before ordering committal for civil contempt. It is a power that must be exercised sparingly (*Gay v. Hancock* [1887] 56 LT 726; *Wilson v. Raffalovich* [1881] 7 QBD 553 at 561, CA; and *Marshall v. Marshall* [1966] 110 Sol Jo 112, CA) and, I may add, judiciously. The court will move cautiously and will only punish disobedience to an order of the court, or for non-compliance with an undertaking once the court is satisfied that the terms of the order or the undertaking are very clear and unambiguous (*Iberian Trust Ltd v. Founders Trust and Investment Co Ltd* [1932] 2 KB 87; and *PA Thomas & Co v. Mould* [1968] 2 QB 913, [1968] 1 All ER 963). The court too must be satisfied that a copy of the order has been served on the contemnor. As a general rule, there is a necessity for personal service. It must be noted that no order of court that requires a person to do or abstain from doing any act may be enforced unless a copy of that order has been served personally on the same person who is required to do or abstain from doing the act in question. And, it is also clear that in a case where the order requires a person to do an act the copy of that order must be served on that person before the expiration of the time within which he was required to do the act in question. Personal service would therefore be of prime importance to the court. The court must also be satisfied that the breach of the order or the undertaking has been proved beyond reasonable doubt (*Re Bramblevale Ltd* [1970] Ch 128, [1969] 3 All ER 1062, CA; *Knight v. Clifton* [1971] Ch 700, [1971] 2 All ER 378, CA; *W Watson & Sons Ltd v. Garbe* [1962] 106 Sol Jo 631; and *Churchman v. Joint Shop Stewards' Committee of Workers of the Port of London* [1972] 3 All ER 603, [1972] 1 WLR 1094, CA).

But, unfortunately, on the day of the hearing of encl. 24, Mr KF Lim for the applicant sprung a surprise. He applied orally to withdraw encl. 24 but with liberty to file afresh.

Mr Gurmit Singh must be elated at this pleasant news. He quickly submitted that he had no objections to the withdrawal of encl. 24 but he sought for:

(1) costs; as well as

(2) the striking out of encl. 24 with no liberty to file afresh.

He advanced the following reasons for his tough stand:

(a) that there were no reasonable reasons given to this court or to both the respondents for the withdrawal of encl. 24;

(b) that the first respondent in the person of Hasman bin Jalil had filed an affidavit on 2 July 2002 and that affidavit was affirmed on the same day as seen in encl. 26 (by letter dated 2 July 2002, encl. 26 was served onto the applicant's solicitors M/s Rusmah Arunan & Associates as seen in encl. 30);

(c) that only yesterday he was alerted by the learned counsel for the applicant of his desire to withdraw encl. 24;

(d) that he had prepared the getting up for encl. 24 comprising of four local authorities and two authorities from the United Kingdom and he then handed these authorities to this court and the authorities may be stated as follows:

(1) *Capital Insurance Bhd v. BS Sidhu* [1996] 3 CLJ 477, CA;

(2) *Anthony Dubis v. Syarikat Kuin Je Sdn Bhd* [1996] 4 MLJ 597, HC;

(3) *Leow Seng Huat v. Low Mui Yein* [1996] 2 BLJ 266 HC;

(4) *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 2 CLJ 695, CA;

(5) *PA Thomas & Co & Ors v. Mould & Ors* [1968] 1 All ER 963, Queen's Bench Division; and

(6) *Chiltern District Council v. Keane* [1985] 2 All ER 118, CA.

(e) that he was merely asking for costs in the sum of RM2,500 for the first respondent; and

(f) he reiterated that the applicant should not be given liberty to file afresh encl. 24.

I was magnanimous and I allowed the first respondent to address this court and this was what he said (as translated into the English language):

> I agree with what my lawyer had said a moment ago.

I too allowed the second respondent to address this court and this was what he told this court (as translated into the English language):

> I agree with the submissions of Mr. Gurmit Singh. I have since disassociated myself from the company – show an extract from the R.O.B. (Registrar of Business) and the court then marks it as enclosure 29. And I ask that I should not be involved in this case anymore. I too ask for costs of RM2,500.

I then showed encl. 29 to the learned counsel on both sides and I too perused through encl. 29 which showed that the second respondent withdrew from his involvement in the company known as "Zeq Construction And Trading Co" on 19 July 2001.

Mr Gurmit Singh then handed to me the six authorities which he referred to earlier and I have reproduced them in this judgment.

Mr KF Lim proceeded to reply. He submitted that the issue of costs was entirely at the discretion of this court. He nevertheless submitted that if the costs are too high, he proposed that costs be assessed. He pointed out that the second respondent did not file any affidavit and was not represented by a legal counsel and so he submitted that the costs for the second respondent should be lower. Taking into account factors like mental worry and the costs of transportation to and from the court, Mr KF Lim submitted that the costs that would be due to the second respondent should be in the region of RM100 to RM200 only.

In regard to the first respondent, Mr KF Lim submitted that after taking into account factors like transportation, mental worry, engaging a counsel, that counsel preparing getting up and filing an affidavit, he suggested that costs should be in the region of RM500 to RM800 only.

In regard to the question of liberty to file afresh, Mr KF Lim submitted that he withdrew encl. 24 because there were several issues from the point of view of adhering to the provisions of the RHC that could only be carried out with some semblance of orderliness by withdrawing encl. 24 and refiling the same in the near future. In short, Mr KF Lim applied to withdraw encl. 24 because there was non-compliance with the rules as set out in the RHC. I wonder what they were as he did not venture to elaborate.

Mr. Gurmit Singh then responded and he revealed that his fees were in the sum of RM7,000. The first respondent then addressed this court and he told this court that that was indeed true and that he had only paid, thus far, a sum of RM3,500. According to the first respondent, the balance of the fees would only be paid next week.

Mr Gurmit Singh again submitted and he said that in regard to the issue of costs, he submitted that the proposals advanced by Mr KF Lim were far too low – "terlampau rendah". Mr Gurmit Singh submitted that costs in favour of the first respondent should be in the sum of RM2,500.

In regard to the issue of liberty to file afresh, Mr Gurmit Singh submitted that the first respondent should not be burdened with the issue of the non-compliance with the rules of the RHC and that the issue of the non-compliance with the procedural rules as set out in the RHC have been raised by the first respondent in his affidavit in encl. 26. At this juncture, it can be appreciated the dilemma of Mr KF Lim. He was certainly put in an unenviable position. It was the submission of Mr Gurmit Singh that this was an application for a committal proceeding. It was in the nature of a quasi criminal. A very serious charge had been levied against the first respondent. And, I may add, against the second respondent also. The applicant should ensure that the provisions in the rules of the RHC should be adhered to. He then gave an example. That the sealed copies of the orders of the court dated 3 May 2001 and 6 June 2001 have not, till today, been served to either the first respondent or to the first respondent's previous counsel by the name of M/s Rohaina & Balendran or even to Mr Gurmit Singh himself. These were said to be the essential prerequisites. Now, only now, this court was appraised of the true state of affairs.

It must be borne in mind that the sealed copies of those orders too have not been served on the second respondent.

Indeed, I did say in the early part of my judgment about the necessity of personal service. Bereft of any proof of service of those two orders onto both the respondents, there was no leg for the applicant to stand on. So, it was not a surprise – in retrospect, when the applicant withdrew encl. 24. And that withdrawal was final and conclusive. It was a foregone conclusion. Had encl. 24 proceeded as scheduled, the applicant cannot, in law, succeed. So, why should this court give the applicant a second bite at the cherry?

Mr KF Lim argued further and he said that the costs as suggested by Mr Gurmit Singh were too high. In regard to the liberty to file afresh encl. 24, he submitted that the matter was handled by the previous solicitors

and after he took over the affairs of the matter he discovered that those orders as alluded to by Mr Gurmit Singh had not been served. And in view of the serious implications in regard to the non-compliance with the rules of the RHC especially in the context of non-service of those orders and bearing in mind that the applicant's application had merit, it was the submission of Mr KF Lim that he was compelled to withdraw encl. 24 in order to ensure compliance with the rules of the RHC before he could refile the same application again. For all these reasons, he craved that his application to withdraw encl. 24 with liberty to file afresh be allowed.

From the tenor of Mr KF Lim's submissions, it was crystal clear that the two orders – one dated 3 May 2001 and the other dated 6 June 2001, had not been served on both the respondents. Of course, on the authorities of *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518; *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58; and *Chung Onn v. Wee Tian Peng* [1996] 5 MLJ 521, an applicant can certainly file contempt proceedings under O. 52 of the RHC without the need to proceed under the Criminal Procedure Code or the Penal Code even though the relief sought, just like encl. 24, is imprisonment and/or a fine. The law gives the widest possible power to the court to wield its might against any contemnor. Thus, art. 126 of the Federal Constitution gives the Federal Court, the Court of Appeal and the High Court the necessary power to punish any contempt of itself. This power is again reflected in s. 13 of the Courts of Judicature Act 1964 (Act 91) as amended by A886, s. 9 thereof. In short, contempt proceedings can be dealt with by the Federal Court, Court of Appeal and the High Court and the procedure is governed by O. 52 of the RHC. Justice Anuar (who later rose to be the Chief Judge of Malaya) in the case of *Mbf Holdings Bhd & Anor v. Houng Hai Kong & Ors* [1993] 3 CLJ 373, HC at p. 378 succinctly said:

> It is paramount to the public interest that every court should have the power and authority or jurisdiction to punish persons who scandalise it or disobey orders made by it. If such power is absent, then the public will lose all confidence in the authority of the judicial arm of the state leading to anarchy and disorder.

But, all things said and done, the procedures must be followed to the letter. Now, in order to constitute a contempt of court through disobedience of a court order, it is crucial to note that the alleged act of contempt has to take place and only take place after the court order is communicated or made known to the contemnor. In other words, service of the court order must be effected upon the contemnor. The liberty of the subject is of paramount importance. Before

proceeding with the contempt proceedings, the court must ensure that there must be strict compliance with the rules especially that part that requires the court order to be served on the contemnor. Abu Mansor JCA in *Capitol Insurance Bhd v. BS Sidhu (supra)*, held that a person is said to be in contempt only after he had been served with the sealed copy of the court order according to the rules and upon service thereto he proceeded to disobey that court order.

I have before me the affidavit of the first respondent as reflected in encl. 26. It is this very affidavit that Mr Gurmit Singh emphasised upon. I am entitled to read that affidavit and two paragraphs of that affidavit must have influenced Mr KF Lim in withdrawing encl. 24. I will now reproduce in verbatim that affidavit in encl. 26, particularly paras. 9 and 10 thereto, in its original text:

> 9. Saya menyatakan bahawa sehingga ke hari ini pihak Pemohon tidak menyerahkan sesalinan meterai perintah-perintah Mahkamah bertarikh 3.5.2001 dan 6.6.2001 kepada saya mahupun peguam saya yang sebelum ini iaitu Tetuan Rohaina & Balendran. Saya juga menyatakan bahawa perintah-perintah tersebut adalah tidak jelas, tepat serta mengelirukan dan tiada notis penal yang dirujuk di dalamnya.
>
> 10. Saya menafikan perenggan 8 dan 9 Afidavit tersebut dan menyatakan tiada butir-butir terperinci ketidakpatuhan saya kepada perintah-perintah Mahkamah bertarikh 3.5.2001 dan 6.6.2001 di dalam Afidavit tersebut mahupun di dalam Notis Usul bertarikh 5.4.2002, Notis Usul (*Ex parte*) bertarikh 25.1.2002 dan Pernyataan Menurut Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 bertarikh 25.1.2002. Saya menyatakan bahawa saya diprejudiskan oleh tindakan ini kerana tidak dapat membela tindakan ini dengan sempurna.

That would be the truth of the matter. The truth hurts. As Denis Diderot in Le Neveu de Rameau once said:

> We swallow greedily any lie that flatters us, but we sip only little by little at a truth we find bitter.

Now, there is a reference to a penal notice in para. 9 of encl. 26. All parties seem to overlook the essential requirement of a penal notice that should be incorporated in those two orders. I must, at once, say that it is a pre-requisite that before an order of court can be enforced, the order must contain the appropriate penal notice. The failure to include the penal notice, as is the case here, may render the court order unenforceable in a committal proceeding (*O.K.R.S.T. Arumugam v. K.R.S.S.P. Suppiah Chettiar* [1935] 4 MLJ 4). In addition to that, I too have this to say.

The failure to comply with the rules as set out in the RHC should be borne by those who prepare and file encl. 24 without ascertaining whether those two orders have been served on both the respondents. And the test as to whether there has been negligence is the standard of the ordinary skilled person exercising and professing to have that special skill (*Mathew v. Maughold Life Assurance Co Ltd* [1987] 3 PN 98, at 103, CA).

In regard to the issue of costs, I have this to say. It is entirely up to the discretion of the court whether to order costs to be paid. It is certainly a judicial discretion that has to be exercised on fixed principles. It is a discretion that is exercisable according to the rules of reason and justice and not according to the private opinion of the judge (*Sharpe v. Wakefield* [1891] AC 173). It is a discretion that will not be based on benevolence (*Kierson v. Joseph L. Thompson & Sons Ltd* [1913] 1 KB 587) or even sympathy (*Bevington v. Perks* [1925] 2 KB 231). There were materials that were advanced before me to compel me to exercise my discretion and order costs in favour of both the respondents (*Mayor of Bristol v. GW Railway* [1916] WN 47). The materials may be stated as follows:

(1) that the first respondent had filed an affidavit as seen in encl. 26 challenging the application in encl. 24;

(2) that both the respondents were present in court at the hearing of the application in encl. 24 – ever willing to face the court notwithstanding the nature of the application in encl. 24;

(3) that the applicant must have decided to withdraw the application in encl. 24 upon sight of the affidavit in encl. 26;

(4) that there was an admission by the learned counsel for the applicant when he submitted that the withdrawal of the application in encl. 24 was due to the non-service of those orders to both the respondents;

(5) that the learned counsel for the first respondent had prepared his case and had produced six authorities to challenge the application in encl. 24; and

(6) that the second respondent addressed this court and sought for the costs and he too produced a document from the Registrar of Business to show that he had left the company on 19 July 2001.

It would certainly be perverse in the extreme to allow the applicant a chance to withdraw and refile the same application as in encl. 24. The mistake in filing encl. 24 with all its attendant consequences must be borne by those who were responsible in drafting and filing that application. There are no two ways about it and that would be the judgment of this court.

Conclusion

For the reasons as adumbrated above, I made the following orders:

(1) that the application in encl. 24 be dismissed forthwith with no liberty to file afresh; and

(2) that the applicant be ordered to pay the following costs:

(a) to the first respondent in the sum of RM2,500.00; and

(b) to the second respondent in the sum of RM800.00.